No. 23-1053

In the

Supreme Court of the United States

CLETUS WOODROW BOHON, ET AL.,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF *AMICUS CURIAE* CLAREMONT INSTITUTE'S CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

ANTHONY T. CASO
Counsel of Record
Constitutional Counsel Group
1628 N. Main St. #289
Salinas, CA 93906
(916) 601-1916
atcaso@ccg1776.com

Counsel for Amicus Curiae

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INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life, including the core principle of separation of powers which prohibits delegation of legislative power. The Center has participated in a number of cases before this Court raising these issues including the original petition for writ of certiorari in this case (No. 22-256) as well as *West Virginia v. Environmental Protection Agency*, 142 S.Ct. 2587 (2022); *Gundy v. United States*, 139 S.Ct. 2116 (2019); *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92 (2015); and *Dept. of Transp. v. Association of American Railroads*, 575 U.S. 43 (2015).

SUMMARY OF ARGUMENT

The lower court dismissed this case challenging the constitutional authority of the Federal Energy Regulatory Commission because it was not brought to the Commission in the first instance. This Court granted certiorari, vacated the judgment, and remanded the case to the United States Court of Appeals for the District of Columbia Circuit to reconsider its holding in light of this Court's decision in *Axon Enterprises v. Federal Trade Comm'n*, 143 S.Ct. 890 (2023). In that case this Court held that a special stat-

[1] All parties received timely notice of the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution to fund the preparation and submission of this brief.

utory review scheme did not displace the federal-question jurisdiction of District Courts to adjudicate constitutional claims that fell outside the administrative agency's "sphere of expertise." *Id*. at 196. In his concurring opinion, Justice Thomas expressed his view that Article III adjudication is likely required when private rights, such as the right to property, are at stake. *Id*. at 198 (Thomas, J., concurring). Property rights are at stake here as this case concerns whether Congress can delegate to the Federal Energy Regulatory Commission the power to delegate to a private company the government power of eminent domain.

Nonetheless, the court below again dismissed the petitioners' claim, this time as untimely. The lower court decided that any constitutional claim needed to be brought before "a court of appeals receives the record in a suit challenging" the agency certificate. Pet. App. at 3. Thus, the court ruled that petitioners here, who were not parties to the challenge to the administrative order, could not bring their constitutional challenge to the agency's authority to issue that order. *Id*.

This is a vitally important case. At issue is the constitutional authority of the administrative agency. As this Court noted in *Axon*, claims challenging the constitutionality of agency authority are not within the scope of the agency's expertise and it is unlikely that Congress would have committed that issue to agency adjudication. This case raises issues that go the heart of the Constitution's structural protection of individual liberties. These are claims that should be heard by an Article III tribunal. In this brief, amicus explains the importance of the constitutional issues presented.

The Constitution, through the structure of the Separation of Powers, and the Vesting Clause with its limitations on the exercise of legislative power, prohibits delegation of legislative power to executive agencies and prohibits delegation of the power of eminent domain to private entities. Here Congress delegated to the Commission the power to issue a certificate of convenience to a private company, which includes the power of eminent domain, if the Commission determines that company is "qualified" and that the service will be required by "public convenience and necessity." Congress left to the Commission's discretion the definition of those terms. There was no guidance or intelligible principle by which this Court could measure the scope of the delegation. The Court should grant the petition and allow petitioners to present, in an Article III court, their contention that the enabling legislation is an unconstitutional delegation of legislative power.

REASONS FOR GRANTING THE WRIT

I. The Non-Delegation Doctrine Is an Inherent Feature of Constitutional Structure.

"The nondelegation doctrine bars Congress from transferring its legislative power to another branch of Government." *Gundy v. United States*, 139 S.Ct. at 2121 (plurality opinion). The Doctrine is inherent in the design of government. Non-Delegation is required by Separation of Powers and is mandated by the Vesting Clause of Article I, § 1 with its limitations on the manner that Congress may exercise its legislative power.

A. The Non-Delegation Doctrine Is Required by Separation of Powers

There can be no question that our Constitution describes a government of enumerated and separated powers. Nondelegation is a requirement of that separated powers structure. *Mistretta v. United States*, 488 U.S. 361, 372 (1989); *Field v. Clark*, 143 U.S. 649, 692 (1892).

The Framers and Ratifiers of the Constitution understood that separation of powers was necessary to protect individual liberty. In this, the founding generation relied on the works of Montesquieu, Blackstone, and Locke for the proposition that institutional separation of powers was an essential protection against arbitrary government. *See, e.g.*, Montesquieu, The Spirit of the Laws 152 (Franz Neumann ed., Thomas Nugent trans., Hafner Publ'g Co. 1949) (1748); 1 William Blackstone, Commentaries on the Laws of England 150-51 (William S. Hein & Co., Inc. 1992) (1765); John Locke, The Second Treatise of Government 82 (Thomas P. Peardon ed., Prentice-Hall, Inc. 1997) (1690).

These warnings against consolidated power resulted in structural separation of power protections in the design of the federal government. *See* Federalist No. 51, at 321 (James Madison) (Clinton Rossiter, ed., 1961); Federalist No. 47, *supra*, at 301, 308 (James Madison); Federalist No. 9, *supra*, at 72 (Alexander Hamilton); *see also* Letter from Thomas Jefferson to John Adams (Sept. 28, 1787), in 1 The Adams-Jefferson Letters 199 (Lester J. Cappon ed., 1959). That design divided the power of the national government into three distinct branches, vesting the legislative authority in Congress, the executive power in the

President, and the judicial responsibilities in the Supreme Court and lower federal courts. *INS v. Chadha*, 462 U.S. 919, 951 (1983).

This Court has also recognized that separation of powers is a core structural principle of the Constitution that protects personal liberty. *Boumediene v. Bush*, 553 U.S. 723, 797 (2008); *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991); *Mistretta*, 488 U.S. at 380.

Because of this structural separation of powers, Congress does not have authority to delegate its own power to another entity. *Gundy*, 139 S.Ct. at 2121 (plurality opinion), 2133 (Gorsuch, J., dissenting); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935). As John Locke notes, legislatures have the power to make laws, not legislators. John Locke, THE TWO TREATISES OF CIVIL GOVERNMENT, Book II, §141(Hollis Ed. (1764)) (Liberty Fund Online Library at 156). Were it otherwise, the entire structure of separated power would fall like a house of cards as one branch delegated (or usurped) the power of another. *See Metro. Washington Airports Auth.*, 501 U.S. 274, n. 20.

The structural separation of powers is not the only part of the Constitution that requires a Non-Delegation Doctrine. That doctrine is also required by the Vesting Clause and its attendant restrictions on the manner in which Congress can exercise the legislative power.

B. Non-Delegation is required by the Vesting Clause

The Founders cemented the rule of separation of powers into the structure of the Constitution with the

Vesting Clauses. *Dep't of Transp. v. Ass'n of Am. Railroads*, 575 U.S. at 67-68, 74 (Thomas, J., concurring in the judgment); *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 714 (2015) (Thomas, J., dissenting). As Justice Thomas has noted, "the Constitution does not speak of 'intelligible principles.' Rather, it speaks in much simpler terms: 'All legislative Powers herein granted shall be vested in a Congress.'" *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 487 (2001) (Thomas, J., concurring). There is a clear textual command in Article I, section 1 that any legislative power authorized by the Constitution is vested in Congress. Congress can no more authorize another branch of government (or a private party, for that matter) to exercise legislative power than it could delegate the judiciaries' power to hear cases and controversies away from the courts, *see Stern v. Marshall*, 564 U.S. 462, 482-83 (2011), or assign to itself the President's power to execute the laws, *see Bowsher v. Synar*, 478 U.S. 714, 733-34 (1986); *see also Dep't of Transp.*, 575 U.S. at 68 (Thomas, J., concurring in the judgment) ("When the Government is called upon to perform a function that requires an exercise of legislative, executive, or judicial power, only the vested recipient of that power can perform it."); *Clinton v. City of New York*, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring) ("Abdication of responsibility is not part of the constitutional design).

Article I not only vests legislative power in the Congress, it also limits how that power may be exercised. The legislative branch is divided into two houses. A proposed law must be passed by both houses, and then it must be presented to the President for approval or veto. U.S. Const., Art I, §§ 1, 7; *Dep't*

of Transp., 575 U.S. at 68 (Thomas, J., concurring in the judgment); *Chadha*, 462 U.S. at 945.

The Constitution intentionally made it difficult to exercise legislative power. The Framers and Ratifiers understood that the power to legislate was the power most dangerous to individual liberty. *Gundy*, 139 S.Ct. at 2133 (Gorsuch, J., dissenting). As Justice Gorsuch noted, the Framers "went to great lengths to make lawmaking difficult." *Id.* Efficiency was definitely not the goal in the design of the lawmaking power.

The requirements of bicameralism and presentment are interdependent in the design to restrain the legislative power. *Chadha*, 462 U.S. at 948-49. In slowing the legislative process, the framers sought to require careful consideration before a new law could be enacted. *Id.*; *see Gundy*, 139 S.Ct. at 2135 (Gorsuch, dissenting).

If Congress could delegate its lawmaking power to an executive agency, all these constitutional restrictions on the enactment of new laws would be rendered a nullity. Laws would be enacted without the need for broad agreement by two different politically accountable legislative bodies. Gone too is the feature that required agreement from legislative bodies accountable to different political majorities – states in the case of the Senate and congressional districts in the case of the House of Representatives. Instead, an unaccountable executive agency is left free to fashion new law without any oversight or accountability. The Constitution's limitation on the manner of enacting laws demands a robust Nondelegation Doctrine.

II. The Statutory Scheme at Issue Raises Serious Non-Delegation Concerns.

In *Calder v. Bull*, Justice Chase noted that "a law that takes property from A and gives it to B … is against all reason and justice," and the court could therefore not presume that the Legislature authorized such an action. *Calder v. Bull*, 3 U.S. 386, 388 (1798). Although this Court authorized (in a decision that has rightly drawn intense criticism) a *government entity's* use of eminent domain to take private property from one citizen and award it to another, there was at least a fig leaf rationale that such a taking was based on the legislature's judgment that there was a public use involved in such a transaction. *Kelo v. City of New London, Connecticut*, 545 U.S. 469, 488-89 (2005).

Here, however, power has been delegated to the Federal Energy Regulatory Commission to formulate the rules for when a natural gas pipeline should be permitted. The Commission used that broad delegation to make an additional delegation, this time to a private company, to exercise the government's power of eminent domain. The power that the Commission has granted to this private entity allows for it to take the property of a private citizen (like the petitioners here) and award it to itself. While the pipeline company might, under the discredited *Kelo* decision, argue that the Commission made a determination that the taking of the property of A and awarding it to B served a public purpose, there is no *legislative* determination supporting such a claim.

Individual rights in the ownership of private property are the "essence of constitutional liberty." *Johnson v. United States*, 333 U.S. 10, 17 n.8 (1948). In a word, they are "fundamental." *In re Kemmler*, 136

U.S. 436, 448 (1890). Justice Washington noted that rights that are "fundamental" are those that belong "to the citizens of all free governments." *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823). He listed individual rights in property as one of the primary categories of fundamental rights. *Id.*

It is beyond strange, therefore, to assume that Congress would delegate power to an executive agency to delegate the power of eminent domain to a private company. The power delegated to the agency is itself broad and undefined and therefore constitutionally problematic, but the derivative delegation of that dubious power to a private entity makes the unconstitutionality all the clearer. *See, e.g., Schechter Poultry*, 295 U.S. at 537; *Dept of Transp.*, 575 U.S. 60-61 (Alito, J., concurring). The legality of this frightfully expansive delegation of lawmaking authority should be reviewed by an Article III court. There is no basis to conclude that such a constitutional claim should be at the mercy of the timing of an administrative challenge to which petitioners are not a party and of which may have no notice.

CONCLUSION

Procedures set down in the Constitution for exercise of Congressional power were deliberately structured to produce "conflicts, confusion, and discordance" as a means of assuring "full, vigorous, and open debate on the great issues affecting the people and to provide avenues for the operation of checks on the exercise of governmental power." *Bowsher v. Synar*, 478 U.S. at 722. Efficiency was not the goal in this design. *Free Enterprise Fund v. Pub. Accounting Board Oversight Bd.*, 561 U.S. 477, 499 (2010). No matter how inefficient, "the power to enact statutes may only "be

exercised in accord with a single, finely wrought and exhaustively considered, procedure." *Chadha*, 462 U.S. at 951; *Clinton v. City of New York*, 524 U.S. at 439-40. Congress may not circumvent this "finely wrought" procedure by simply delegating lawmaking power to an administrative agency. Nor may an executive agency, pursuant to such an unlawful delegation, exacerbate the constitutional problem by further delegation to a private entity. The Court should grant the petition for writ of certiorari.

April 2024 Respectfully submitted,

ANTHONY T. CASO
Counsel of Record
Constitutional Counsel Group
1628 N. Main St. #289
Salinas, CA 93906
(916) 601-1916
atcaso@ccg1776.com

Counsel for Amicus Curiae